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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1270

EUGENE C. KELLEY,
Petitioner,

vs.

SOUTHERN PACIFIC COMPANY, a corporation,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief for Respondent in Opposition

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SUBJECT INDEX

	Page
Opinion Below	1
Jurisdiction	1
Question Presented	2
Statute Involved	2
Statement of the Case	2
Argument	6
I. The Threshold Problem of the District Court's Findings	6
II. The Decision in Conflict Is Clearly Wrong	9
III. The Decision Below Is Clearly Correct	12
IV. There Is No Question of Federal Law Which Needs to Be Reviewed by the Court at This Time	15
Conclusion	16

TABLE OF AUTHORITIES CITED

Cases	Pages
Baker v. Texas & Pac. R.R., 359 U.S. 227 (1959)	11, 12
Cimorelli v. New York Cent. R.R., 148 F.2d 575 (6th Cir., 1945)	11
Dougall v. Spokane P. & S. Ry., 207 F.2d 843 (9th Cir. 1953)	13
Edwards v. Pacific Fruit Express Co., 390 U.S. 538 (1968)	3
Norman v. Spokane P. & S. Ry., 101 F.Supp. 350 (D. Ore. 1950), affirmed *per curiam* 192 F.2d 1020 (9th Cir. 1951)	12, 13
Pennsylvania R.R. v. Barlion, 172 F.2d 710 (6th Cir. 1949)	11, 12
Pennsylvania R.R. v. Roth, 163 F.2d 161 (6th Cir. 1947)	11
Reed v. Penn. R.R., 351 U.S. 502 (1955)	15
Robinson v. Baltimore & Ohio R.R., 237 U.S. 84 (1915)	11
Smith v. Norfolk and Western Ry., 407 F.2d 501 (4th Cir. 1969), cert. den'd., 395 U.S. 979	9, 11, 12, 15, 16
Southern Pacific Co. v. Gileo, 351 U.S. 493 (1955)	15
Turpin v. Chicago B. & Q. Ry., 403 S.W.2d 233 (Mo. 1966), cert. denied, 384 U.S. 1003	4, 13
United States v. Carver, 260 U.S. 482 (1923)	15
Ward v. Atlantic Coast Line R.R., 362 U.S. 396 (1960)	11

Statutes	Pages
28 U.S.C. § 1254(1)	2
45 U.S.C. § 51	2, 10
32 Stat. 232	10

Texts	
30 A.L.R. 2d 517 (1953)	3
Restatement of Agency 2d, § 509, Comment a	10

Miscellaneous	
Hearings on S.1708—Before the Subcommittee of the Committee on the Judiciary, 76th Cong., 1st Sess., pp. 3, 56, 57, (1939)	14

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OPINION BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 486 F.2d 1084 (9th Cir. 1973).

JURISDICTION

Contrary to the date set forth in the petition, the judgment of the Court of Appeals for the Ninth Circuit was entered September 7, 1973. A timely petition for rehearing with suggestion for rehearing *en banc* was denied and

rejected November 21, 1973, no judge of the court having requested a vote on the suggestion for rehearing *en banc*. Contrary to the code section cited in the petition, we believe this court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the scope of the plaintiff-class of the F.E.L.A. shall be enlarged to include the employees of agents of common carrier railroads.

STATUTE INVOLVED

The text of the Federal Employers' Liability Act set forth in the petition omits several lines near the end of the quotation. The pertinent provisions of the Federal Employers' Liability Act (45 U.S.C. § 51, hereafter sometimes "the Act" or the "F.E.L.A.") read as follows:

> "§ 51. Every common carrier by railroad while engaging in commerce between any of the several States . . . shall be liable in damages to any person suffering injury *while he is employed* by such carrier in such commerce, or, in case of the death of such employe, to his or her personal representative, . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment. . . ." 45 U.S.C. § 51 enacted Apr. 22, 1908, c. 149, § 1, 35 Stat. 65; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404 (Emphasis supplied)

STATEMENT OF THE CASE

The basic framework of this case has to do with the scope of the plaintiff-class of the F.E.L.A. The Act, by its terms, confines the plaintiff-class to *employees* of common carrier

railroads (and representatives of deceased employees). The plaintiff here, however, was an employee of a trucking company. He was injured while working on a railroad car, situated on railroad property. The district court found the trucking company to be an *agent* of the defendant. On that basis (that the plaintiff was an *employee* of an *agent*), the district court extended coverage of the Act to plaintiff, citing as authority a decision of the Fourth Circuit. The Ninth Circuit, disagreeing with the Fourth Circuit, reversed. The facts are set forth in more detail in the next paragraphs.

The operations of the rail industry are closely interrelated with many other operations—those of its suppliers, those performing services on its premises (coal loading, grain inspection, protective service for perishables, etc.), its shippers and consignees, other railroads, those performing services to or on cars, and a host of terminal and accessorial operations.[1] As this Court has noted, ". . . there exist a number of activities and facilities which, while used in conjunction with railroads and closely related to railroading, are yet not railroading itself." (*Edwards v. Pacific Fruit Express Co.*, 390 U.S. 538 (1968).)

An often litigated question is whether the employees of such firms, when injured, are eligible for a Federal Employers' Liability Act suit against the common carrier railroad. In fact there are literally hundreds of appellate decisions on the question. This case presents that problem as it arises in the interface of the rail industry with the accessory service of loading and unloading of vans on flat-

1. A.L.R. observes: "It is a frequent occurrence that employees of other companies work on or about railroads. For instance, various loading and unloading jobs, maintenance, and construction of new facilities are handled for the railroads by subcontractors." (30 A.L.R.2d 517 at 518 (1953))

cars (piggyback service) and unloading of automobiles on bi-level and tri-level auto rack cars (multilevel service).

Nationally, from the inception of piggyback and multi-level transportation these ramping and deramping services have predominantly been performed by teamster personnel working for trucking companies.[2] They have not been performed by railroad personnel working in any of the various rail craft classifications. In the present case, the district court explicitly found the plaintiff had been doing this type work "for a period of eight years" prior to his injury (1963), i.e., from the inception of piggyback service on Southern Pacific. (Finding III and reporter's transcript from the district court, p. 356 and following.)[3] Pacific Motor Trucking Company (hereafter sometimes referred to as "PMT") was the company hired to do that work in the present case.

The plaintiff, Eugene C. Kelley, was injured July 3, 1963, in San Francisco, while unchaining new automobiles from the top level of a railroad tri-level car, preparatory to unloading the autos. The district court found the normal incidents of employment—hiring, payroll, power to discharge—existed between Kelley and Pacific Motor Trucking Company. The district court explicitly found Kelley was "in the employment of Pacific Motor Trucking Company". (Finding II.) Contrary to the assertion in the last paragraph on page 6 of the petition, there is no finding in which the district court found Kelley to be "an 'employee' of Southern Pacific". In fact, as will be related shortly, the

2. See description in *Turpin v. Chicago B. & Q. R.R.*, 403 S.W. 2d 233 (Mo. 1966), p. 234.

3. The reporter's transcript will hereafter be referred to as "R.T." Portions of the transcript have two page numbers—a typed number and a stamped number. Our references will be to the stamped number.

district court *rejected* a conclusion of law framed in *exactly* these words. (See motion and order for modification of the record in the Ninth Circuit proceedings.)

Kelley retained attorneys and applied for and received workmen's compensation and medical care from Pacific Motor Trucking Company. The attorneys, however, neglected to see the obvious common law suit against this defendant. The anniversary date of one year—the period fixed by California law for limitation of negligence and product liability suits—came and went, without any suit having been filed. Two years came and went. Three days short of three years, the F.E.L.A. limitation period, this suit was filed. It alleges an employment relationship between Kelley and the defendant Southern Pacific Company.[4]

The pertinent proceedings in the suit were as follows: pursuant to stipulation at pre-trial the case was bifurcated, with trial of the sole issue of the existence of an employment relationship to be held first, before a judge. In due course trial on this phase commenced before The Honorable Alfonso J. Zirpoli. At the conclusion of the initial phase, the court announced the intention to rule for plaintiff and adopted Findings of Fact and Conclusions of Law which are the subject of discussion in the first section of our argument.

Following completion of this initial phase of trial the parties, at a later date, stipulated in open court as to remaining issues (including damages) and judgment was granted and entered accordingly.

The Ninth Circuit reversed the judgment of the district court.

4. In a separate count it also alleged an alter ego theory vis a vis PMT and respondent. This theory was abandoned in the district court and is specifically abandoned here—see footnote, p. 5 of petition.

ARGUMENT

I. The Threshold Problem of the District Court's Findings.

The petition raises an unarticulated problem of whether the district court found Kelley to be an employee of Southern Pacific. Petitioner asserts that it did. The Ninth Circuit did not think so:

> "Thus, the district court, not persuaded by the evidence that Kelley was a servant or an employee of Southern Pacific in common law conception, concluded that the 'agency relation' . . . sufficed . . .".

The problem of whether the district court found Kelley to be an employee can be quickly resolved. It does not take a genius to read the Findings of Fact and Conclusions of Law. Doing so, one observes:

i. there is an *explicit* finding of "employment" by one entity: "Plaintiff and the three men he was working with . . . were in the employment of Pacific Motor Trucking Company." (Finding II)

ii. there is no finding of *"employment"* by any other entity.

iii. the normal incidents of employment—the power to hire and fire, and the payment of wages—are *explicitly* found to exist in regard to Kelley and PMT: "Plaintiff and the three men he was working with . . . were hired, paid by and could be discharged by Pacific Motor Trucking Company . . .". (Finding II)

iv. there are no such findings concerning any other entity.

v. there are no findings of joint employment, borrowed servant, or any of the other possibilities by which one in the service of one employer enters the service of another employer.

It seems hard, from a plain reading of the findings, to escape the conclusion the district court found Kelley to be

an employee of PMT and of no one else. There are, however, three additional factors which inescapably point toward that conclusion:

i. the issue of "employment" was framed by the pre-trial order as the sole issue before the court; moreover, the question was repeatedly briefed and urged before the court. The court was thoroughly educated on the issue,[5] and knew that employment by a common carrier railroad was an essential element of Kelley's case, *according to any conventional understanding of the Act.*

ii. most important of all, the parties submitted Proposed Findings of Fact and Conclusions of Law. Plaintiff offered a Conclusion which *explicitly stated* that:

> "The plaintiff, Eugene C. Kelley, was an 'employee' of defendant Southern Pacific Company as set forth in *Baker v. Texas and Pacific Ry. Co.*, 359 U.S. 227 (1959), and *Ward v. Atlantic Coast Line*, 362 U.S. 396 (1960)."

A hearing was held in chambers at which the findings were settled. The court *refused* to adopt the foregoing statement, or any similar statement.

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5. The following colloquy occurred at the start of trial:

"THE COURT: May I ask you a question? If your theory is correct, why do you need this evidence? If your theory of pickup and delivery and your operational theory is correct, why do you need any of this evidence of control?

MR. ENGEL: Well, Your Honor, what our purpose in putting the evidence on is to actually anticipate any argument that the defense may have with regard to the Smith case. In other words, we intend to show, and I think the interrogatories in fact, and the depositions, show as much factual basis for decision as existed in the Smith case.

THE COURT: Well they would be justified in the sense of putting that evidence on for the purpose of showing that there is no control, number one, under the borrowed servant doctrine. But I don't know what purpose it would serve for them if the very nature of the business transaction makes the trucking company the agent. What difference does it make whether there is any control or not? I am just asking the questions." (R.T. 4 and 5)

iii. the district court instead adopted the following Conclusion of Law:

> "I. At the time and place of this accident the work being performed by Eugene C. Kelley . . . brought plaintiff within the traditional agency relationship to Southern Pacific Company and in such relationship to Southern Pacific Company as to be covered by the Federal Employers' Liability Act."

In a footnote the district court states:

> "In making the above findings of fact and conclusion of law the court gave consideration to the rulings in *Baker v. Texas and Pacific Railroad*, 359 U.S. 227 (1959); and *Ward v. Atlantic Coast Line*, 362 U.S. 396 (1960); and *Smith v. Norfolk and Western Railway Company*, 407 F.2d 501 (1969); . . ."

In comparing the Conclusion of Law proposed by petitioner with that adopted by the district court, (ii and iii above) one sees two principal changes:

i. the court changed the wording, "Kelley was an employee . . ." to read, "brought plaintiff within the traditional *agency* relationship . . ." (emphasis ours), and

ii. the court added a citation in the footnote to those offered by petitioner (in his proposed conclusion), namely, the case of *Smith v. Norfolk and Western, supra,* the very case which (as will be pointed out hereafter) adopts the formula of "employee of an agent".

Thus, both from a plain reading of the Findings and from comparison of the Proposed Conclusion with the Conclusion as adopted, one must conclude that the threshold issue of "what the district court found" was correctly resolved by the Ninth Circuit. Alternatively, if petitioner's position is to be examined, the only legal issues then before this

Court concern the rules to be applied in interpreting court findings, and concomitant matters, e.g., who has the burden of proof on the issue of employment, etc. These are issues which:

i. were not briefed or urged below;

ii. do not present a conflict in the circuits; and

iii. do not present questions of importance worthy of this court's review.

II. The Decision in Conflict Is Clearly Wrong.

The basis for the district court's ruling in favor of plaintiff is a 1969 decision of the United States Court of Appeals for the Fourth Circuit, *Smith v. Norfolk and Western Ry.*, 407 F.2d 501 (4th Cir. 1969), cert. den'd., 395 U.S. 979, a case which is genuinely conflicting with the present case, both in decision and principle. Moreover, the factual setting of *Smith* is exactly parallel to the present case, i.e., a teamster employee of a trucking company fell from the top level of a tri-level rail car while unchaining automobiles preparatory to unloading them. The trucking company was acting as the agent of the railroad in "grounding" the autos —i.e., in driving them off the multilevel cars to the ground.

After reciting the facts, the *Smith* court in the second paragraph articulates the legal premise underlying the entire opinion:

> ". . . if the injured worker is employed by an *agent* . . . of the railroad he will be treated as an employee . . . for purposes of the Act." (p. 502, emphasis supplied.)

The remainder of the opinion is devoted—not to an explication of the underlying legal premise—but rather to reasons why the district court's finding of agency was "not erroneous". It would take a complete brief in itself to point out the errors in this portion of the opinion, but that is not necessary at this stage. The quarrel is with the basic

premise—that employees of agents are within the plaintiff-class. That proposition is wrong for the following reasons:

1. It is contrary to the wording of the statute. The plaintiff-class of the F.E.L.A. is clearly set out by the statute: it is confined to employees, and the personal representatives of deceased employees. It does not include "agents" or "employees of agents". The limited scope of the plaintiff-class can best be understood by comparing it with the class with which it is juxtaposed: the class of persons for whose acts the carriers are made liable. The Act makes carriers liable for negligence of "the officers, agents, or employees of such carrier." (45 U.S.C. § 51.) Each word in that phrase changed or substantially modified a rule of law. The references to "officers" and "employees" abolished the fellow servant rule.[6] The reference to liability for "agents" changed another common law rule, i.e., the rule of no liability for the acts of non-servant agents. (Restatement of Agency 2d § 250.) In short, the inclusion of each word was deliberate, not mere phrase-making.

Moreover, the Employers' Liability Act of 1906, 32 Stat. 232, (held unconstitutional in The Employers' Liability Cases, 207 U.S. 463 (1908)) applied to every common carrier—not just railroads. (See p. 497 for discussion.) This feature was changed in the 1908 version of the Act.

Thus, the contrasts between the 1906 and 1908 Acts, and between the plaintiff-class and the class for whose acts the carriers were liable, make clear the limited scope of the plaintiff-class. The omission of "agents" in the plaintiff-class is plain, conspicuous and intentional.

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6. See Restatement of Agency 2d, § 509, Comment a. Even superintendents were fellow servants, and there was generally no liability for negligent supervision in the operative details of the work. The reference to "officers" changed that situation.

2. The proposition that employees of agents are within the plaintiff-class is without sanction in the decisions of this Court. There is no construction of the Act by this Court which would justify such a result. On the contrary, from the earliest cases (e.g., *Robinson v. Baltimore & Ohio R.R.*, 237 U.S. 84 (1915)), to the last treatment of the problem (*Baker v. Texas & Pac. R.R.*, 359 U.S. 227 (1959); *Ward v. Atlantic Coast Line R.R.*, 362 U.S. 396 (1960)), this Court, in construing the plaintiff-class, has repeatedly stated the concept of "employment" is not a special one, i.e., one which would embrace employees of agents, but the orthodox one. In the *Robinson* case (237 U.S. 84) the plaintiff was a Pullman Company employee (a porter), attempting to sue the common carrier railroad on whose trains he worked. The Court notes:

> "We are of the opinion that Congress used the words 'employe' and 'employed' in the statute in their natural sense and intended to describe the conventional relation of employer and employe. It was well known that there were on interstate trains persons engaged in various services for other masters. Congress, familiar with this situation, did not use any appropriate expression which could be taken to indicate a purpose to include such persons among those to whom the railroad company was to be liable under the Act." (p. 94)

Thus, there is no warrant in the decisions of this Court for the special concept of employment adopted by the *Smith* Court, viz.: the concept of "employment" as including "employees of agents".

3. The authorities cited by the *Smith* Court do not stand for the proposition cited. The *Smith* decision relies on three cases from the Sixth Circuit: *Cimorelli v. New York Cent. R.R.*, 148 F.2d 575 (6th Cir., 1945); *Pennsylvania R.R. v. Roth*, 163 F.2d 161 (6th Cir. 1947); and, *Pennsylvania R.R.*

v. Barlion, 172 F.2d 710 (6th Cir. 1949). On examination each of these cases will be seen to adopt the orthodox analysis requiring *employment*. They are, perhaps, startling results for a defense oriented lawyer, but nevertheless the rationale is conventional—i.e., the injured person is found to be an *employee* of the common carrier railroad.[7] There is not one iota of support in any of the three decisions cited by the *Smith* court for the proposition that being an employee of a railroad's agent—as opposed to being an employee of the railroad itself—is sufficient to invoke coverage of the F.E.L.A. In fact, there is no discussion of agency at all. However broad a concept of employment these cases stand for, they do not stand for the proposition that the nexus of employment can be done away with and replaced by employment by an entity other than the common carrier.

Thus, even without full dress analysis, *Smith v. Norfolk and Western Ry.* can be fairly characterized as clearly wrong, in that its central premise is contrary to the plain meaning of the Act, is not supported by decisions of this Court and is not even supported by the authorities cited for it.

III. The Decision Below Is Clearly Correct.

Although there are a multitude of appellate decisions on the subject of when one becomes an employee for F.E.L.A. purposes, the Ninth Circuit citations represent a particularly thoughtful selection on the subject. The cornerstone of the opinion is *Baker v. Texas & Pac. R.R.*, 359 U.S. 355 (1959), the leading case. Additional authority includes two prior Ninth Circuit cases in which the plaintiffs were, respectively, repairing a railroad bridge and maintaining a roadbed, *Norman v. Spokane P. & S. Ry.*, 101 F.Supp. 350 (D. Ore. 1950), affirmed *per curiam* 192 F.2d 1020 (9th Cir.

7. These cases are also obvious examples of one circuit following its own precedents.

1951), and *Dougall v. Spokane P. & S. Ry.*, 207 F.2d 843 (9th Cir. 1953). These cases are important, among other reasons, because the plaintiffs were doing work which is traditional railroad work—i.e., maintenance of structures and way. The legal theories discussed are similar to those suggested in the present case.

The *Turpin* case cited by the Ninth Circuit (*Turpin v. Chicago B. & Q. Ry.*, 403 S.W.2d 233 (Mo. 1966), cert. denied, 384 U.S. 1003) is a leading case in a factual setting similar to that of the present case. Thus, reliance is especially well placed on the authorities cited by the Ninth Circuit.

A second aspect of the decision below that merits discussion here has to do with the statutory history of the 1939 amendments to the Act. This is dealt with in the last paragraph of the court's opinion. Not only is the history there recited correct, but a wealth of additional material supports it, including the following:

i. In the decade of the 1930's Congress enacted the basic labor relations and social insurance legislation for the rail industry. In each of these acts, Congress *included* railroad-owned companies which performed services in connection with the transportation of property by railroad. But, Congress specifically *excluded* from such coverage "trucking service." Congress thus accorded a separate legislative treatment not only to the peripheral industries (by inclusion) but *especially* to railroad-owned trucking companies furnishing services in connection with railroad operations (by exclusion). (Non-railroad-owned companies performing such services were not within the scope of the acts anyway.) See the "(other than trucking service)" exclusion in the Railway Labor Act, 45 U.S.C.

§ 151. First; Railroad Retirement Act of 1937, 45 U.S.C. § 228a(a); Carriers Taxing Act of 1937, 50 Stat. 435 § 1, Internal Revenue Code of 1954, 26 U.S.C. § 3231(a); Railroad Unemployment Insurance Act, 45 U.S.C. § 351(a). This is the background against which Congress considered the proposed amendments to the F.E.L.A. in 1939—i.e., a decade of recognition and separate legislative treatment of teamster performed terminal services.

ii. In testimony on the effect of the 1939 amendments in broadening the scope of the F.E.L.A. there was *specific* explanation to the senators of the existence of "companies which are subsidiaries of railroads . . .". Following a question whether the proposed amendment would "include the subsidiaries, these truck lines owned by the railroads?", the assurance was given by the witness (the General Counsel of the Railroad Trainmen): "no." (citation following)

iii. At a later point in the testimony the same witness (McGrath) and another witness assured the senators that the representative of the Teamsters stated that "he was very much opposed" to inclusion, and "did not want to have the teamsters brought under the act . . .". (Hearings on S.1708—Before the Subcommittee of the Committee on the Judiciary, 76th Cong., 1st Sess., pp. 3, 56, 57, (1939).)

Thus the detail of the legislative history is much stronger and much more explicit than is discussed in the Ninth Circuit's opinion.

This history has been repeatedly briefed and urged. Petitioner has yet to respond to it. We challenge petitioner in his reply brief to point out the inapplicability of this legislative history. If he will not do so, this Court should take it as an acknowledgement that it is correct.

In summary, in terms of clarity of analysis and expression, in terms of apt consideration of authority, in terms of judicious consideration of all aspects of the matter, including the statutory history, the Ninth Circuit's opinion and decision can only be characterized as clearly correct.

IV. There Is No Question of Federal Law Which Needs to Be Reviewed by the Court at This Time.

Several miscellaneous contentions of petitioner ought to be examined:

Petitioner appears to argue that the denial of certiorari for *Smith v. Norfolk and Western* constitutes approval.[8] Such an argument is patent nonsense in view of this Court's often repeated statements to the effect that "the denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times." (*United States v. Carver*, 260 U.S. 482 (1923).)

Petitioner argues (p. 10) that the "spirit and intent" of the 1939 amendments to the Act was to extend the suit to anyone injured while "performing interstate work". This astonishing argument clearly overlooks the fact that the 1939 amendments rejected any change in the plaintiff-class (as detailed earlier) and dealt only with the problems created by the so-called "moment of injury" test. The amendments thus left intact the requirement of *employment*, but eliminated distinctions based on whether the particular traffic was in intrastate or interstate commerce. This Court's construction of the 1939 amendments is found in *Reed v. Penn. R.R.*, 351 U.S. 502 (1955), and *Southern Pacific Co. v. Gileo*, 351 U.S. 493 (1955).

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8. Petitioner also relies on denial of *certiorari* in another case viz.: *Bryne (sic) v. Pennsylvania R. Co.*, 262 F.2d 960. We do not attempt to analyze *Byrne* since it also relies upon an orthodox employment relationship analysis for its result.

The reason for mentioning these arguments at all is simply to point out their frivolous and insubstantial character. The overriding fact of this petition is the complete failure to analyze, discuss and support the rationale of the *Smith* case. Not one argument of substance is advanced in favor of the expanded *Smith* formulation of the plaintiff-class! If the petitioner himself cannot defend the *Smith* decision, there is no danger that any of the other circuits or appellate courts of the country will be mislead—in view of the compellingly correct decision of the Ninth Circuit. That is why we urge that certiorari be denied here—there is no reason to suppose other courts will adopt the erroneous *Smith* view, and there are no other questions of substance raised by this petition.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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